No. 85-1244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether the annexation of undeveloped and unpopulated land by a municipality without any black voters is cognizable as a change in voting practice or procedure capable of denying or abridging the right to vote on account of race within the meaning of § 5 of the Voting Rights Act of 1965.

2. Whether racially neutral and racially inconseqential annexations of vacant and undeveloped lands can be rendered retroactively unacceptable for § 5 purposes because the jurisdiction seeking preclearance for those actions subsequently declines to annex an area substantially populated by blacks.

3. Whether the utilization of § 5 preclearance procedures as a means to force § 5 jurisdictions to undertake unrelated annexations which will substantially increase their black voting populations constitutes an invalid and illegal application of § 5.

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF or Foundation) is a nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the public interest. WLF has more than 80,000 members located throughout the United States, including in the State of Alabama, whose interests the Foundation represents.

This brief is filed with the written consent of all parties.

WLF is strongly opposed to the improper judicial extension of federal legislation beyond the legitimate scope of the authorizing statute. Because that problem has been especially evident in some federal civil rights cases, WLF has been active in litigation involving the issue of whether the federal civil rights laws have been extended beyond their intended scope. Reflecting this concern, WLF recently filed briefs urging more restrained application of such federal laws in *Thornburg v. Gingles*, No. 83-1968, and *City of Riverside v. Santos Rivera*, No. 85-224, both cases argued this term in this Court.

This case presents what we believe to be an especially serious distortion of the Voting Rights Act of 1965 ("VRA"). Using its jurisdiction to review preclearance denials under § 5 of the VRA as a basis for reviewing other areas of local government activity, the U.S. District Court for the District of Columbia has effectively ordered a small Alabama town to undertake a financially disadvantageous annexation of a nearby black community. The court's decision seems to reflect the view that an all-white Southern jurisdiction covered by § 5 is subject to virtually unlimited court-ordered impositions merely on the basis of a history of past discrimination in unrelated areas.

WLF is concerned that the sound original objectives of the VRA are being improperly invoked to justify unprecedented judicial intrusions on local government autonomy. We believe this case represents a significant opportunity for this Court to address that problem.

STATEMENT OF THE CASE

In the interests of brevity, the *amicus curiae* adopts the statement of the case set forth in the brief of the appellant, the City of Pleasant Grove.

SUMMARY OF ARGUMENT

1. The only changes in voting standards, practices, or procedures arguably requiring § 5 preclearance by the City were the 1969 and 1979 annexations of essentially vacant and undeveloped land. Since the City itself had no black voters whose rights could be diluted or otherwise abridged by those annexations, and since the annexations were totally inconsequential in any event in terms of affecting the City's demography, those annexations could not possibly be objectionable under § 5. Further, to ascribe to the City a discriminatory purpose as to minority voting for an annexation which had *no* racial implications with respect to voting or otherwise is legally and logically insupportable.

2. Section 5 does not authorize courts to engage in plenary review of a city's policies and practices concerning matters not themselves subject to § 5 preclearance regulation. Lacking any basis for finding a discriminatory purpose in the City's actual annexations of undeveloped areas, the district court purported to establish a non-existent "linkage" between those annexations and the subsequent decision declining to annex the fully developed and substantially black Highlands area. But § 5 gives courts no warrant to roam at large in search of unrelated discriminatory acts not themselves subject to § 5 in order to supply a discriminatory purpose otherwise absent from the actual changes that call § 5 into play. If this Court endorses the district court's approach, federal courts will have unbridled license to use § 5 preclearance procedures as a device for imposing their own policy preferences on any jurisdiction that has a history of past discrimination.

3. The district court's decision reflects an insupportable distortion of the lofty but nonetheless limited purposes of the VRA. The court used the Act as a justification for compelling a small town to submit to an annexation it otherwise was legally entitled to decline. Section

5 of the VRA cannot lawfully be utilized to pressure local governments into accepting policy decisions which are not required by the VRA itself. Further, it is improper for § 5 to be used as an instrument for imposing arbitrary and punitive obligations upon a local government simply because it has a history of past discrimination considered shocking by the court. Here, notwithstanding that the annexations subject to preclearance were entirely unobjectionable in themselves, the court seized upon the City's mere inaction on a matter not subject to § 5 as a justification for extraordinary judicial interference in the City's self-governance. No reasonable reading of the VRA can justify such consequences.

ARGUMENT

Preliminary Statement

This case presents a glaring distortion of the goals underlying the Voting Rights Act of 1965 (hereafter "VRA"), 42 U.S.C. § 1973 *et seq.* Among other unprecedented conclusions, the district court held that (1) a city's annexation decisions can violate the VRA even where it has *no* minority voters whose rights could possibly be affected, and even where the annexations in question in no way affect, much less diminish, minority voting rights or minority voting power; (2) a city falls out of compliance with the VRA merely by *declining* to annex a developed and populated adjoining area which petitions for annexation, as long as that area is substantially populated by blacks; and (3) a city is required by the VRA to approve an annexation which would actually *dilute* the bloc voting power of the minority voters who would be included in the annexation.

The decision below stands for the proposition that the symbolic, sociological, and punitive applications of the VRA are more important than its specific legal purpose of securing full voting rights for minorities. The practical result in this case does nothing to advance either

the voting rights or the bloc voting efficacy of minorities. If anything, it would work to dilute the voting power of the affected blacks.[1]

Legal abstractions aside, the only plausible rationale for the decision below is to punish an all-white jurisdiction for its alleged past race discrimination in areas *other than voting rights.* But the VRA cannot lawfully be invoked for that punitive and arbitrary purpose.

This Court should not countenance the lower court's attempt to distort the genuine objectives of the VRA for the purpose of inflicting a form of unfocused, gratuitous retribution against an all-white municipality for its alleged transgressions in areas entirely separate from voting and election practices.

I. ANNEXATIONS HAVING NO CONCEIVABLE CONSEQUENCES OR IMPACT AS TO ACTUAL MINORITY VOTING RIGHTS CANNOT BE OBJECTIONABLE UNDER § 5.

To place this case in perspective, it should be recalled that the precise issue is whether the City's annexations of two undeveloped, essentially vacant parcels in 1969 and 1979 [2] constituted "changes" in voting practices hav-

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[1] As the record shows, blacks living in the area which the district court would compel the City to annex exercised very substantial voting power in Jefferson County elections—where, for example two of the eight State Senators elected were black (D. 309, pp. 12-14, 24). In Pleasant Grove, however, the black voters of the Highlands area would be submerged in an overwhelmingly white electorate.

[2] The Glasgow addition, annexed 17 years ago in 1969, was inhabited by only a single white family of 14 persons (D. 17, p. 3, and Ex. B). This "population" is so inconsequential that it is appropriate to refer to the land as essentially vacant and uninhabited under the maxim *de minimis non curat lex.* The lower court misrepresented the facts by referring to the Glasgow addition and the Western addition as "white areas." The Western Addition, annexed in 1979, was literally and totally uninhabited.

ing the purpose or effect of denying or abridging the right to vote because of race or color. 42 U.S.C. § 1973c.

Although the district court has attempted to portray the subsequent *non*-annexation of the substantially black Pleasant Grove Highlands (hereafter referred to as the "Highlands") as though it too was an actionable "change" under § 5—or as though it were integrally related to the prior annexations of undeveloped lands—this is simply not the case. While the VRA has concededly been expanded well beyond its literal parameters by judicial construction, it has not yet been warped so drastically as to require § 5 preclearance every time a city declines to take some action which might be construed as favorable to minorities in general or to the general principles of integration. There must be a tangible, positive action or event to trigger § 5's requirements; otherwise a jurisdiction could never ascertain just when they were called into play. Eschewing an annexation—like, e.g., declining to seek construction of a high-rise apartment, or a mass transit station—simply does not implicate § 5.

There is no dispute that the City's electorate was all white at all times pertinent to this case. Nor, despite the lower court's disingenuous attempt to misportray the undeveloped land additions as "white areas," is there any genuine dispute concerning the fact that the annexed areas were essentially *un*populated and *un*developed. These circumstances, we submit, render these annexations as fundamentally and legally distinct from the potentially "diluting" annexations which alone have been held to raise problems under the VRA.

The fact that this Court has recognized that *some* annexations raise problems under § 5 by no means requires that *all* annexations have actionable voting rights consequences. *See City of Port Arthur v. United States*, 459 U.S. 159, 165 (1982) ("§ 5 was not intended to forbid all expansions of municipal borders that could be said to have diluted the voting power of particular groups in the community."). This is made clear by the principles and analysis underlying this Court's decisions applying the Act to particular annexations.

Perkins v. Mathews, 400 U.S. 379, 389 (1971), stressed that it is only where the annexation produces an identifiable change in the composition of the electorate—i.e., one having genuine potential to result in racial discrimination as to voting—that the VRA is implicated. In fact, the Court indicated that § 5 should come into play only where the election constituency is "*substantially*" changed. *Id.* at 391. The two annexations at issue here, even when considered together with the "non-annexation" of the Highlands, clearly do not produce that kind of identifiable change in the electorate. Indeed—other than the wholly inconsequential addition of a solitary household living in the Glasgow addition—the annexation measures in question produced *no change at all* in the composition of the electorate.

The annexation at issue in *Perkins* was held subject to § 5 specifically because it could significantly dilute the effectiveness of the minority voters already residing within the town in question. There is no comparable dilution effect or potential caused by the Pleasant Grove annexations. Hence, under the clear principles underlying this Court's *Perkins* decision, there can be no plausible § 5 objection in this case.

Other decisions of this Court also establish that annexations raise genuine voting rights issues only where they entail cognizable voting or election *consequences*, such as minority vote dilution; the decisions do not establish that annexations *per se* always implicate the VRA. If the annexation has no meaningful voting or election consequences, it is not within the purview of the voting rights legislation. That is precisely the case here.

Thus, in *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court stressed that

> [T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise. [Emphasis added.]

Clearly, the instant annexations of vacant land by an all-white city cannot possibly have a "retrogressive" effect on any minority voting rights. It is analogous to, say, a rural town in Utah annexing portions of a nearby desert wilderness—an event wholly without racial consequences relative to voting rights.

More recently, in *City of Port Arthur v. United States*, *supra*, 459 U.S. at 165-67, and *Lockhart v. United States*, 460 U.S. 124, 134 (1983), this Court has continued to recognize that it is only where annexations or other government actions work a "retrogressive" effect on the voting rights of actual minorities living within the affected unit that they can violate § 5. Thus, in rejecting voting rights complaints against certain proposed changes in *City of Lockhart v. United States*, 460 U.S. at 135, the Court stressed, "Although there may have been no improvement in their [i.e., the minorities'] voting strength, there has been no retrogression either." This Court therefore ruled that the challenged changes were entitled to preclearance. *Id.* at 134.

In *City Comm. to Oppose Annexation v. City of Lynchburg*, 400 F. Supp. 568, 572 (W.D.Va.), *aff'd in part and vacated in part on other grounds*, 528 F.2d 816 (4th Cir. 1975), the court properly delimited the kind of annexations which trigger § 5's requirements as follows: ". . . [A]nnexations *which enlarge the number of voters* in a city are changes in a 'standard, practice, or procedure with respect to voting' which are covered by § 5." [emphasis added.]

The same consistent analysis precludes the finding of any valid grounds for denying preclearance in this case.

The thread that runs through all the cases where boundary enlargements were held subject to § 5 is the existence of a *genuine* threat, or the actuality, of minority vote dilution. There is no such possibility in this case. Whatever philosophical objections there may be to a Southern, all-white city's annexations of essentially vacant, undeveloped lots of adjoining land, they are not actionable under the VRA.

In straining to find grounds to deny preclearance, the district court recognized that the vacant and undeveloped nature of the proposed additions was incompatible with any conventional claim that the annexations were discriminatory. As expressed in Judge MacKinnon's forceful dissent (J.S. App. A pp. 15-17), the majority compensated for this deficiency in their § 5 theory by the simple expedient of misstating the facts. Thus, the district court's opinion portrays the City as approving the annexation of "white areas", while declining to annex the predominantly black Highlands area under an alleged double standard.

But the City was *not* annexing any "white areas", and there was no double standard. It was following a fiscally sound and sensible policy of annexing undeveloped, essentially *vacant* areas which would maximize municipal revenues and minimize municipal costs. These were strictly land-use decisions based on sound and sensible economic considerations. They affected *no one's* voting rights. Hence, it is illogical to subject such actions to the anomalous requirements and standards of the VRA. More to the point, it is contrary to the plain language of § 5.

The lower court's language in its initial decision on summary judgment is especially instructive in this regard, for it inadvertently reveals the flawed analysis underlying this ruling. After stating that "the failure to annex is a violation of the Act provided a discriminatory purpose is shown," the court attempted to clarify its holding as follows (J.S. App. B at pp. 10-11):

> This does not mean, of course, that Pleasant Grove or any other community would be required to annex contiguous areas merely because such areas may be inhabited by blacks. But it does mean that a community may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard.

The fallacy of this analysis lies in its glib but false premise that the City had in fact annexed "white areas" even while it declined to annex "black areas" under discriminatory standards. As the record confirms, the City did not annex "white areas" in this case. The Western addition was entirely vacant and undeveloped, a fact of record not in dispute. The Glasgow addition had only a single white family totaling 14 people, a wholly insignificant happenstance which does not alter the undeveloped character of the area under any reasonable standard. Moreover, the Glasgow annexation occurred so far in the past—i.e., in 1969, some *17 years ago*—that it is plainly invalid to compare its origins and purposes to those of the 1979 decisions respecting the Western and Highlands additions.

Nor did the court have any permissible basis for concluding that these additions were "white areas" on the convenient theory that it was likely that they would so develop in the future. Such judicial speculation cannot form the basis for denying preclearance under § 5. A city cannot be deemed in violation of the VRA because of a judge's mere prognostications and probability evaluations.

Nothing of record indicates that City decision-makers were considering voting rights consequences of any kind when they decided to annex the unpopulated Western addition, and it would have been bizarre if they had. They were too preoccupied with the practical economic realities of the decision to contemplate the near meta-

physical voting rights implications contrived by the Justice Department and the district court in this case.

These land annexations were racially neutral and racially inconsequential under any reasonable standard. They had no effects or implications with respect to voting or election practices. Thus, it was clear error for the court to equate them with the annexation of an area already populated with substantial numbers of white voters, as in cases such as *City of Richmond v. United States*, 422 U.S. 358 (1975).

II. THE LOWER COURT'S DECISION CONSTITUTES AN INVALID AND IMPROPER APPLICATION OF THE VOTING RIGHTS ACT.

A. The VRA Does Not Require Affirmative Measures By Government Units To Enlarge Their Minority Voting Base Through Annexation Of Areas Outside The Unit.

The charges leveled against the City in this case really have nothing to do with infringement or abridgement of the voting rights of any identifiable minority persons. Not a single black person's voting rights have been affected in any way by the City's annexation decisions. Nothing done, or not done, by the City in that respect has either deprived any black of the opportunity to vote, or diluted the impact of the "black vote" as a voting bloc. These facts are indisputable on the record in this case.

The *actual* reason for the lower court's ruling was the City's decision not to annex the predominantly black Highlands addition—even though this non-event, or inaction, would not trigger § 5 preclearance in itself. Against the backdrop of the City's prior annexations (one of them had occurred 10 years in the past) of two additions which were both essentially vacant and undeveloped, the district court imposed on Pleasant Grove what amounted to an "affirmative action" obligation to approve *any* annexation which would result in a higher proportion of black voting

residents in the City. In effect, the court ruled that it was illegal for an American town to exercise its judgment in declining to enlarge its borders. This is unprecedented judicial arrogation.

Although the legislative history of the VRA and its amendments is extremly expansive in describing the Act's scope, *see* H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News p. 2437 and S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982 Amendments) (May 25, 1982), it nowhere purports to approve a policy of court-ordered expansion of municipal borders, effectively requiring municipalities to act as the guarantors of the voting rights of citizens *other than their own.* But the district court's decision here is shaped and grounded on exactly such a policy.

The district court used its § 5 power not to further minority *voting* rights, but to advance broad, unarticulated social and racial goals which are manifestly beyond the legal scope of the VRA. In this, the district court committed a clear error of statutory interpretation and judicial excess.

The court utilized its power to approve the City's annexation of the unpopulated Western addition as a jurisdictional lever to force approval of a separate and totally unrelated annexation petition involving an entirely different kind of land area. But merely because the court has authority under § 5 to rule on particular annexations which a city *has* decided to undertake does not give it *carte blanche* to pronounce on the wisdom or validity of the City's unrelated decisions declining to approve other annexations. Nor does it give the federal courts authority to undertake what amounts to plenary review of a city's overall annexation policies. But here the court has used the carefully restricted § 5 power to impose its broad, liberal visions of desirable integration policy on this small Alabama town. This is simply not authorized by § 5.

As stated in *Beer v. United States*, 425 U.S. at 141, § 5 is properly confined to assuring that covered jurisdictions do not manipulate changes in their voting practices and rules so as to lead to retrogression in the voting rights of affected racial minorities. Clearly, the City's decision declining to annex the Highlands sector produced neither a "voting change" nor any "retrogression" in the effective exercise of the franchise by minorities. How can there be a § 5 problem when there is simply no change in voting or election practices? Under the standards of *Beer v. U.S.* and related cases, this "non-annexation" is merely a preservation of the status quo which raises no actionable consequences under the VRA.

Nor is the result any different if the "non-annexation" of the Highlands is viewed against the backdrop of the prior annexations of the Glasgow addition and the Western addition. Putting aside the fact that the 1969 Glasgow annexation is too remote in time to be lumped together with the 1979 denial of annexation of the Highlands as part of the same calculated annexation "policy," it is plain that a city's annexations of vacant and undeveloped nearby lands do not give rise to a legal obligation under VRA to make some offsetting annexation of minority-populated lands. Section 5 contains no "linkage" doctrine which authorizes the Justice Department or the district court to withhold preclearance of innocuous measures until the affected jurisdiction submits to policy concessions demanded in other areas of civil rights concern. Yet that is precisely the implication of the lower court's opinion in this case.

Thus, the district court brushed aside all legal and logical impediments to its § 5 ruling on the strength of its evident conviction that the City's past record of generalized discrimination offset any shortcomings of proof or precision in the particular proceeding before it. Even though the specific city actions before it could have no adverse impact on black *voting* rights, the court nonethe-

less concluded that a purpose to produce such an effect could be *inferred* from the generalized discriminatory conduct of the past.

By focusing on the City's separate decision against annexing the Highlands addition—a decision which by itself would clearly *not* be subject to § 5, since it would produce no voting "change"—the court attempts to supply a racial context for the prior annexations which were in fact racially neutral and purely economic in motive and result. The Western addition was annexed to provide additional vacant land subject to development which would generate needed fees and revenues for the City. There could be no discriminatory impact on the voting rights of minorities, since none resided in either the annexing unit or the annexed land. By any reasonable measure, the Western annexation was a racially neutral measure as to voting rights; it is nothing short of absurd to suggest that the annexation was undertaken for its oblique, speculative, and problematic impact on the voting rights of unknown minority persons. In that regard, it would have been much easier, and much more effective, for the City to do nothing and simply preserve the status quo.

If the vacant land annexations were racially neutral and simply inconsequential as to voting rights, then a subsequent development such as the refusal to annex the Highlands does not render them "retroactively" discriminatory. And if the City had no discriminatory purpose in the vacant land annexations, the court cannot supply this missing element by artificially linking those actions to the City's alleged motives in denying the Highlands annexation—a "non-change" which is not subject to or covered by the VRA.

If a city's change in voting practice warrants preclearance under § 5, it cannot properly be denied that preclearance because of a subsequent unrelated action (or inaction) which offends the Justice Department's general standards of virtuous race relations. Yet that is what occurred in this case.

The dangerous flaws of the district court's approach can best be understood by considering its natural consequences. It means that any jurisdiction covered by § 5 [3] can be denied preclearance for otherwise valid changes or actions (e.g., racially neutral annexations or necessary redistricting) merely because it subsequently declines to pursue measures which would increase the jurisdiction's minority voting population. For instance, a town's refusal to approve higher density zoning could be construed as racially discriminatory, and thus provide a basis for withholding preclearance of clearly nondiscriminatory, even remedial, voting law changes. In practical effect, this becomes a form of judicial compulsion for § 5 jurisdictions to submit automatically to *all* proposals leading to increased minority population. Under the district court's rationale, their failure to do so would endanger preclearance for any other necessary voting practice changes it may wish to undertake.

Surely, the VRA was never intended to serve as authority for such pervasive judicial control over municipal land use and growth policy.

Neither the caselaw nor the legislative history interpreting the VRA's aims and scope support the view that the Act can be used to dictate local decisions regarding community growth and land-use planning. Where a jurisdiction does not even have minority voters whose rights might be at risk or subject to dilution, its decision to pursue a particular growth policy is simply not a proper subject for the VRA. It might conceivably be a proper subject for federal housing law or other desegregation policy, but it is beyond the limited focus of the VRA.

Perhaps the most striking aspect of the lower court ruling is how it even goes beyond telling the City what it can do or not do with respect to voting and election prac-

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[3] By definition, any jurisdiction subject to § 5 will have a significant history of racial discrimination.

tices; the court's ruling here actually tells the City what it can *be*, or not be. It presumes to invoke the VRA to dictate what amounts to an affirmative obligation to expand the City's borders and its population.

The VRA clearly does not authorize such radical judicial usurpation. On the contrary, the Act only requires that such annexations as a municipality *does* decide to approve not be undertaken with the purpose or the effect of discriminating against minorities with respect to voting. But where, as here, a city *declines* to annex an area or areas, the VRA does not require the Justice Department or a three-judge court to examine the city's motives for merely retaining its existing borders. For purposes of § 5, non-annexation is a non-event, without legal consequence. *Perkins v. Matthews*, 400 U.S. at 388-89 (annexations call § 5 into play only insofar as they bring about a "revision of boundary lines" or "a change in the composition of the electorate"); *City of Lockhart v. United States*, 460 U.S. at 135 (§ 5 does not compel jurisdictions to adopt particular measures merely because they enhance the voting strength of minorities).

Dissenting in *Perkins v. Matthews*, *supra*, 400 U.S. at 398, Justice Harlan succinctly but cogently stated the simple fact that should control here: "Section 5 requires submission of changes 'with respect to voting' only." The non-annexation of the Highlands area was not a "change", and it had no effect on voting, by anyone, in Pleasant Grove. Hence, it was legally erroneous for the district court to deny preclearance on the basis of that declination.

B. Finding A History Of Generalized Discrimination Is No Substitute For Finding A Purpose To Deny Or Abridge The Right To Vote.

Significantly, the district court does not dispute the fact that the Pleasant Grove annexation decisions, taken together or separately, do not have the "effect" of denying or abridging any minority voting rights. Confronted

with a record that provided no evidence of a discriminatory effect on minority voting rights, the court turned the full force of its energies to the search for some form of discriminatory purpose.

The court clearly erred in finding a discriminatory purpose with respect to voting rights based upon a claimed racial "disparity" in the City's annexation practices. The record shows no genuine disparity in that regard. The Western addition was a vacant, undeveloped area and its annexation would be economically advantageous to the City for reasons such as the receipt of development fees. The Highlands area was already developed and populated, and its annexation would be economically disadvantageous. In light of such considerations, the decision to annex one but not the other was not race-based disparity, but prudent city management. The discriminatory purpose necessary to sustain the denial of preclearance must therefore be found elsewhere.

That left the district court with only the City's alleged history of generalized discrimination as a basis for finding a specific purpose to deny or abridge voting rights in its various annexation decisions. And the court was so preoccupied with what it considered to be an "astounding pattern" of discrimination in general (J.S. App. B p. 3) that it seemingly lost sight of the very specific requirements of the statute before it.

Although a purpose to discriminate in itself may suffice as grounds to deny preclearance, *City of Richmond*, *supra*, § 5 clearly specifies that only a purpose of "denying or abridging *the right to vote* on account of race or color" is cognizable for that purpose. 42 U.S.C. § 1973c [emphasis added].

The district court failed to address this critical distinction adequately in its unfocused findings of discriminatory purpose. It failed to recognize that past incidents of discrimination in other areas—such as employment practices or school integration—cannot substitute for dis-

criminatory purposes with respect to voting rights as specified in VRA § 5. This fundamental flaw in the court's analysis is fatal to the validity of its decision.

The district court justified its reliance on evidence of discrimination in areas unrelated to voting on the basis of this Court's holding in *Rogers v. Lodge*, 458 U.S. 613 (1982) (J.S. App. A, p. 10, n.22 and App. B, p. 4, n.10). *Rogers* was not a § 5 case at all, and it dealt with a county which, unlike Pleasant Grove, manifested extensive evidence of *voting practice* discrimination *against its own black citizens*, see *id.* at 623-24. It is distinguishable from this case in all respects, and, if anything, illustrates the significance of voting-related practices as the critical evidence of discriminatory purpose in voting rights cases.

The distinction between a § 2 case (such as *Rogers v. Lodge*) and a § 5 case is important in this respect. In *Lodge*, for instance, the issue was whether the county violated § 2 by its longstanding *maintenance* of an at-large system of elections over many years. In a § 5 case, by contrast, the question is whether a particular, tangible change in voting or election practice has the purpose or effect of limiting the voting rights of minorities. By definition, the question for the court under § 5 is more specific and narrowly focused on a discrete government action taken at a given point in time. It follows that the scope of factors relevant to determining discriminatory purposes should be more precisely focused as well in the § 5 context.

More importantly, *Rogers v. Lodge* does not hold that the discriminatory purpose prong of § 5 can be satisfied without *any* evidence of discriminatory practices related to the voting rights or opportunities of affected minority citizens. In *Lodge*, there was extensive evidence of long-standing discrimination against minority residents of the county specifically in the voting and election context—i.e., by means of literacy tests, poll taxes, and white primaries. 458 U.S. at 623-25. Thus, *Lodge* stands only for the proposition that evidence of non-voting discrimination may be used to fortify existing evidence of specifically voting-related discrimination in § 2 cases. It does not begin to resolve the distinct issue of whether evidence of non-voting-related discrimination can *wholly substitute* for voting-related discrimination in a § 5 case. The language of § 5 itself addresses that question in plain terms, and it states unambiguously that only a specific purpose "of denying or abridging the *right to vote*" is cognizable.

Because the district court's decision on discriminatory purpose is contrary to this plain language of § 5, it cannot stand. It is evident that the court's strong abhorrence for the City's history of past discrimination allowed punitive considerations to supplant reasoned application of the statutory provisions. This Court should act to prevent such arbitrary misapplication of § 5 by admonishing the lower courts against injecting their social and policy predilections into the particularized and limited determination called for by that provision.

CONCLUSION

The district court's decision drastically exceeds the authorized bounds of the § 5 preclearance procedure and constitutes insupportable judicial intrusion on local government autonomy. The decision should be reversed in all respects.

Respectfully submitted,

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